88-1244

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE M/T STOLT SHEAF, her Engines, Boilers, etc., POSIDEN NAVIGATION, INC., PARCEL TANKERS, INC., STOLT-NIELSEN, INC., and STOLT-NIELSEN A/S,

Petitioners,

—against—

NATIONAL PETROCHEMICAL COMPANY OF IRAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIAN D. STARER
Counsel of Record
HAIGHT, GARDNER, POOR & HAVENS
195 Broadway
New York, New York 10007
(212) 341-7000

CHARLES L. BLACK, JR.
435 W. 116th Street
New York, New York 10027
(212) 854-5086
Counsel for Petitioners

Of Counsel:
CHARLES B. ANDERSON
RICHARD A. MENCHINI
DON P. MURNANE, JR.

QUESTION PRESENTED

May the executive branch, in a single case, and for the purposes of that single case, bindingly direct an Article III court of the United States to accord access and standing to sue to a foreign government that has not been recognized by the United States, or to the instrumentality of such government?

LIST OF PARTIES

The parties to this proceeding are the National Petrochemical Company of Iran, Respondent, and the M/T Stolt Sheaf, Posiden Navigation, Inc., Parcel Tankers, Inc., Stolt-Nielsen Inc. and Stolt-Nielsen A/S, Petitioners. Pursuant to Supreme Court Rule 28.1, Petitioners' parents, subsidiaries and affiliates are set out at page 19a of the Appendix.

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Respondent.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which is not yet officially reported, is reprinted at pages 1a-12a of the Appendix. The opinion of the United States District Court for the Southern District of New York (Owen, J.) is reported at 671 F. Supp. 1009. It is reprinted at pages 15a-17a of the Appendix.

JURISDICTION

Invoking federal admiralty jurisdiction, Respondent brought this action in the United States District Court for the Southern

District of New York. On October 27, 1987 the district court granted Petitioners' motion to dismiss for lack of standing with prejudice.

On Respondent's appeal, the United States Court of Appeals for the Second Circuit on October 31, 1988 entered a judgment and opinion reversing the district court's order (Appendix, pp. 1a-14a).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The federal courts below had jurisdiction of this admiralty cause under 28 U.S.C. §§ 1333 and 1291.

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition involves Article II, §§ 2 and 3 and Article III, § 1 of the Constitution, reprinted at page 18a of the Appendix.

STATEMENT OF THE CASE

In November 1979, militants loyal to the Ayatollah Khomeini seized the United States Embassy in Tehran and took fifty-two American diplomatic personnel hostage. On April 7, 1980 President Carter severed diplomatic relations with Iran and issued Executive Order No. 12,205, 45 Fed. Reg. 24099 (1980), prohibiting the sale of American products to Iran. As a result of the Executive Order, Respondent, the National Petrochemical Company of Iran (hereinafter "NPC"), an arm and instrumentality of the Khomeini government of Iran, could not procure certain essential chemicals from its usual sources in the United States.

As the courts below have found, this action arises from NPC's attempts to circumvent President Carter's trade embargo by entering into an illegal scheme to purchase the needed chemicals through a series of middlemen in the United Arab Emirates, West Germany, and Switzerland. As a result of this scheme, shipping documents were fabricated which con-

cealed both the origin of the chemical cargoes and their destination, and by such illegal methods the middlemen were able to draw on letters of credit issued by NPC before the cargoes were even shipped.

In August 1980, one of the middlemen, Rotexchemie Brunst & Co. ("Rotex") of Hamburg, Germany, chartered the vessel M/T Stolt Sheaf from Petitioner Parcel Tankers, Inc., a Liberian corporation, to transport the chemicals from Houston to Iran via Barcelona, Spain. (Petitioner Posiden Navigation, Inc., a Liberian corporation, was the registered owner of the vessel. The remaining Petitioners, Stolt-Nielsen, Inc. and Stolt-Nielsen A/S, were not engaged in the transportation of the cargoes, but are, respectively, United States and Norwegian companies affiliated with Parcel Tankers.) Rotex planned to deliver the embargoed chemicals to NPC in Iran, but was prevented from doing so by the outbreak of the Iran-Iraq war on September 19, 1980. Pursuant to the terms of the charterparty, Rotex then instructed the vessel to deliver the cargoes to Taiwan, where Rotex resold them.

After several unsuccessful suits against the middlemen in Hamburg and against the vessel in Rotterdam, NPC commenced the present action on September 30, 1986 in the United States District Court for the Southern District of New York, alleging that Petitioners had participated in acts of fraud, conversion, and falsification of bills of lading, and seeking to recover the losses it sustained in its scheme to circumvent the United States trade embargo. Admiralty jurisdiction was invoked.

In October 1987, the district court dismissed NPC's complaint, finding—on the basis of an official 1985 United States State Department letter submitted to Judge Cannella in another case in the Southern District of New York, *Iran Handicraft & Carpet Export Center v. Marjan International Corp.*, 655 F. Supp. 1275 (S.D.N.Y. 1987)—that the United States has not recognized the Khomeini government of Iran. The district court held that because NPC is a wholly-owned entity of an unrecog-

nized foreign government, it is not entitled to bring suit in the courts of the United States.

On appeal, the Acting Assistant Attorney General submitted an *amicus curiae* brief for the United States, contending that "*without regard to questions of recognition*" and for "purposes of resolution of the *instant dispute*", NPC was to be granted access to the district court "*in this case*", on the ground that the executive branch was so directing in this *amicus* brief itself. (Brief for Amicus Curiae the United States of America, U.S. Court of Appeals for the Second Circuit No. 87-2054 [hereinafter the "*amicus* brief"], p. 19, emphasis added). The United States Court of Appeals for the Second Circuit reversed the district court judgment on the basis of this position as set forth in the *amicus* brief.

REASONS FOR GRANTING THE WRIT

The decision of the Second Circuit Court of Appeals in this case gravely disturbs the balance established by the Constitution between the respective functions of the judicial and the executive branches.

I. The New Theory of Ad Hoc Executive Branch Power To Grant Standing in a Single Case

The profound and potentially mischievous error in the Court of Appeals' judgment consists in its having espoused the theory—hitherto, it is believed, never the basis of any judgment or founded on any prior authority—that the executive department, as a matter of law and "*without regard to questions of recognition*", is empowered to order that an Article III court of the United States shall accord "standing" as plaintiff to an unrecognized foreign government, *in a single case.*

This theory entered this case—and, apparently, the world—in an *amicus* brief filed by the United States after an appeal had been taken by the Respondent from the district court's dismissal of the case. That dismissal had been on the ground that the Respondent, an instrumentality of the Khomeini govern-

ment of Iran, lacked standing to bring suit in our courts, since the Khomeini government has not been recognized by the United States; the district judge properly took judicial notice of an official State Department letter unequivocally stating that the Khomeini government has not been recognized by our government.

The United States' *amicus* brief took the position, as novel as it is audacious, that the executive branch has *ad hoc* power to confer standing *pro hac vice*, and that, within its own square corners, such a brief may therefore change its role from *amicus* to that of *dominus curiae*, claiming this power for the executive, and exercising it then and there on the executive's behalf.

The crucial passage in the *amicus* brief (faithfully followed in its tenor by the Second Circuit opinion) is as follows:

> "Finally, *without regard to questions of recognition*, it is the position of the Executive Branch that the Iranian government and its instrumentality should be afforded access to our Courts *for purposes of resolution of the instant dispute* . . . [T]his express statement by the Executive should be treated as dispositive of the issue of the standing of the government of Iran *in this case*." *Amicus* brief, p. 19 (emphasis added).

This language puts it entirely beyond doubt that it is just exactly a case-by-case executive power that the *amicus* brief is, on a single page, both claiming and exercising.

The court below totally accepted this claim, making it the basis of its own judgment. After a recital of a number of general principles as to the President's power over the recognition of foreign governments (none of them conceivably reaching to the extent of validating this new claim of power) and after a sixteen-line canvass of some inconclusive history of recent Iranian-American relations, the court below (closely tracking the form of the *amicus* brief) brushes to one side further inquiry along these lines:

> "It is unnecessary to go further in examining other treaties, documents, or ties in order to ascertain the Executive Branch's intentions regarding Iran's access to the federal courts. The United States has submitted a Statement of Interest [sic] pursuant to 28 U.S.C. § 517 (1982) stating that 'it is the position of the Executive Branch that the Iranian government and its instrumentality should be afforded access to our Courts for purposes of resolution of *the instant dispute.*" Appendix, p. 11a (emphasis added).

The court below responded as follows to Petitioners' assertion that in its very expression this claimed executive power is of a case-by-case application:

> "Appellees protest that for us to defer to what they term an '*ad hoc, pro hac vice*' directive to allow NPC's suit will encourage arbitrary and unpredictable pronouncements on the status of foreign governments, but we need not reach that question here because there is no indication that this is an arbitrary or *ad hoc* directive. This is not a case where the Executive Branch is attempting to prohibit a formally recognized government from bringing a single suit in the United States courts, nor is it a case where the Executive is arbitrarily allowing some suits by an unrecognized nation while disallowing others. Rather, here the Executive Branch—after entering into treaties with Iran, after establishing a claims tribunal to adjudicate disputes between the two countries, and after complying with U.S.-Iran agreements—expressly entered this case as Amicus requesting that Iran be given access to our courts. Under such circumstances, and as the sole branch authorized to conduct relations with foreign countries, the Executive clearly did not act arbitrarily." Appendix, pp. 11a-12a.

But this is, with respect, both unconvincing and unresponsive. If the executive may bindingly direct a court to hear just one case (and what other possible meaning can reside in the phrases, "*in this case*", and "*the instant dispute*"?), then the

executive may fail to direct the next court to hear the next case brought by Iran or by some other country. This executive direction—as the proceedings and reasonings below have shown—is not just an ornament, a fifth wheel. It does real work; it kept this case in court, after the district judge had given proper effect to an official statement, by the State Department, that the Khomeini government of Iran had not been recognized by our government. If this executive direction were omitted in another case, it would not be there to keep that case in court. There can be no possibility that the claim is not a claim of *ad hoc* power to direct the grant of standing *pro hac vice*. "*In this case . . .*"? "For purposes of resolution of *the instant dispute*"?

But the theory on which this extraordinary power is claimed—and confirmed by the Second Circuit panel—invites expansion. There is nothing to limit the application of the theory to the *grant* of standing to an *unrecognized* government. If "recognition" can be ultimately fragmented into single-case actions, then what would prevent the executive branch's directing the *denial* of standing, *in a particular case*, to a hitherto *recognized* foreign government, especially since such prior "recognition" may be, as this same *amicus* brief contends, merely inferred, in the entire absence of categorical official statement? If the present judgment is upheld, no reasons would have to be given. It would be a matter of "foreign affairs," just as surely as the *grant* of "standing," in one case at a time, to an unrecognized government is a matter of "foreign affairs."

Indeed, according to the theory espoused by the Second Circuit, the executive might in our very case change its position at anytime, and *deny* standing to the Khomeini government and its instrumentalities.

Whatever be thought of these possibilities (and they obviously could be multiplied), it is entirely certain that the power at issue *in this case* is the power claimed and exercised *in and for this case*. It is a claim to *ad hoc* power, power to compel a result *pro hac vice*. The *exercise* of this power in this very case may or may not have been arbitrary; we have no way of knowing about

that. But a power to decide *ad hoc*, without reasons given, is certainly an arbitrary *power*. And that is the power claimed.

II. The "Indicia" of Standing Adduced By the Second Circuit

Although there is no suggestion anywhere in the *amicus* brief of the reasons for executive branch intervention *in this one case*, there seems to be a thought expressed in the Second Circuit passage on "arbitrariness", quoted above, that the recent history of our dealings with Iran redeems the executive decision to intervene from any imputation of "arbitrariness." On the other hand the material adduced in the Second Circuit opinion may have been brought forward to suggest, however faintly, that our relations with Iran have been developing toward an amity that might presage the appropriateness of closer ties and so provide an *alternative ground* for the Second Circuit decision granting standing—a ground other than the court's assumption that it is, without more, simply bound by the executive direction. The adduced material does not succeed in performing either of these functions.

Three harbingers of better relations are noted—or perhaps three examples of our being somewhere nearer the threshold of "recognizing" the Khomeini government:

1. The Second Circuit panel observes that our relationship with Iran "has not been unchanging" (Appendix, p. 9a), citing the release of the embassy hostages, on the one hand, and on the other hand the downing of an Iranian passenger jet by the U.S.S. Vincennes.

2. The court also points to our entrance with Iran into the Algerian Accords that resolved the embassy hostage crisis and the establishment of the Iran-United States Claims Tribunal. Appendix, p. 10a.

3. Finally, there is a 1955 Treaty of Amity (Appendix, p. 10a) which the Khomeini government itself has repudiated because of *measures the United States has taken in reprisal* for

Iran's having "flagrantly and repeatedly" violated it. (Congressional Record, vol. 129, No. 157, Nov. 14, 1983, pp. S 16055-60).

It is no wonder that the Second Circuit panel says of these three signs of spring: "Standing alone, none of these indicia of Executive Branch willingness to allow Iran to proceed as a plaintiff in the United States courts would *necessarily* persuade us to reverse the district court and grant access." Appendix, pp. 10a-11a (emphasis added). How can actions taken *in extremis* to end the ordeal of cruelly-abused hostages, or a treaty that the government of Iran has repudiated and that our own government says has been repeatedly and flagrantly violated by Iran, even possibly be "*indicia*" of executive branch willingness to give the Khomeini government or its instrumentalities access to our courts? But the Second Circuit goes on: "[c]onsidering these factors in the aggregate, and not in isolation, as integral components of the United States overall relationship to Iran, the above recited connections *strongly suggest* that the Executive Branch has evinced an implicit willingness to permit the government of Iran to avail itself of a federal forum." Appendix, p. 11a (emphasis added). *Strongly suggest?*

In contrast, one must, however grudgingly, admire the forthrightness of the Ayatollah Khomeini, who has recently said on this same subject: "Just as I have said before, the relationship of Iran and the United States is like the relationship of the wolf and the lamb, and between these two there can never be reconciliation." *New York Times*, Sunday, November 20, 1988, p. L 3.

III. Consequences of the New Theory of Ad Hoc Executive Power

It is understandable that the court below abruptly switches to the new theory of an "executive" power simply to decree standing *pro hac vice*. The examination just concluded of the above "indicia" of standing shows that the Second Circuit's judgment has to rest *entirely* on this newly asserted claim that the "executive branch" possesses the keys to the courthouse door as to

each individual applicant for entry, case by case—as in Milton's *Lycidas*, "The Golden opes, the Iron shuts amain."

This theory and its practice rudely transgress one of the most solemn general canons of constitutionalism—the principle that, while the political branches constantly do, and must, create juristic situations—by recognition or non-recognition, by declaration of war or of neutrality, by passing statutes—it should fall to the courts to individuate, in each case, the effect of these general situations on particular litigants. This, it is submitted, was the traditional view of the effect of "recognition" on the standing of a foreign government to sue in our courts. The President, by "recognition" or its opposite, created a general juristic field; the courts declared the effect of the existence of this field on "standing" to bring suit. The theory given effect in this case goes a very long way toward altogether collapsing into one the executive and the judicial functions and powers. The practice is bad, but it is more alarming that the *theory* is bad, because bad theory can generate bad results that no one can now imagine.

In order fully to assess the dangers of this new doctrine of *ad hoc* executive power to command the concession of standing, this Court must consider what kind of *field* this power is to operate in, as that field is defined by the proponents of the new theory. The opinion of the court below, again tracking the government's *amicus* brief, notes that the practice of formal "recognition" of new governments has been of late on the wane. Appendix, pp. 8a-9a. This to some degree now means, and will increasingly mean in the future, that the courts will, absent executive direction, have to grope their way through actions and events suggesting or resembling "recognition." The Second Circuit panel's "indicia" of this kind of quasi-recognition, or constructive recognition, illustrate the problem, and they illustrate that it is a fearsomely intractable problem. No one can rise from reading that "indicia" analysis without feeling that the same Second Circuit opinion, in its second sentence, is right in calling this a "shoal-strewn area of the law."

The Second Circuit's reasoning cannot produce even minimal predictability on the issue of *recognition vel non*. The result is

that, when and if the executive chooses to grant "standing" to a *single* litigant in a *single* case, it becomes impossible to evaluate the rightness or wrongness of that one decision in itself, against the kaleidoscopic background of factors—"indicia", as the court below calls them—suggesting that "recognition" has occurred or not occurred. Where the law has no standards, its standards cannot be violated—or observed.

The theory of executive-branch power to direct the grant of standing in a specific case runs into a fundamental due process problem—one that would exist in the nature of things, even if there were no due process clause. The *decision*, in the executive branch, to direct a judicial court to accord standing in a *particular* case, if it is not to be wholly aleatory and irrational, must be preceded by some orderly consideration of facts and events. Some person or persons in the executive branch must have made the decision on the basis of what seemed to be rational grounds, having to do with the facts of the case itself, and with its special relation to executive policies. It is ordinarily assumed that a litigant has a right to be heard in respect of any decision that is to be made affecting his interest in a lawsuit. The decision to grant or deny standing to him or to his adversary, *in that very lawsuit and for purposes of that lawsuit alone*, is such a decision *par excellence*. Yet, in this case (as must surely become commonplace under the novel theory of *ad hoc* executive power over standing) Petitioners had no way of knowing, and did not in fact know, that a decision to direct the grant of standing to their adversary, *for the purposes of this suit*, was pending in the executive branch, or what criteria were used to reach such a decision within that branch. If these criteria were specific to this case, the Petitioners had no opportunity to make a factual showing that might rebut the judgments underlying that decision. If some rule or principle was the decisive consideration, the Petitioners had no chance to know about that rule, to argue against its wisdom, or to demonstrate that this case did not fall within its scope. Petitioners are simply notified—by being served (in this case fourteen months after the action was commenced) with a paper from the "executive branch"—that a specific determination, adverse to their interest, had been made, by

which the Court of Appeals later considered itself to be bound, without more. In effect, a motion to dismiss on the well-established ground of lack of "recognition" has been denied, *as to this case*, by something called "the executive branch".

It would be dangerous enough if the "executive branch" assumed and exercised power to decide motions to dismiss altogether *sua sponte*. But no one can think that to be a realistic view of the matter in all, or perhaps in most, cases. Executive branch action, in regard to individual lawsuits, is certain to be sought by people whose interest it is to seek it, or by legislators whose interest can be aroused by constituents. There is nothing *per se* improper in this. But since no notice or statement of reasons *applying to the individual case* need be given, and only one of the parties may have had a chance to be heard, the process utterly contrasts with the judicial process, and yet is conceded the power, as here, to direct the outcome of a single lawsuit.

In close functional connection with this due-process problem is the fact that the ultimate fractionation of a decision into its atomic parts (such as the fractionation into one lawsuit after another, attempted here with respect to the general executive power of "recognition") must result in diffusion of authority to decide, and therefore of *responsibility* for decision. The government *amicus* brief in this case illustrates this, on its very cover. Counsel of record are Department of Justice attorneys—certainly the right people to be *arguing a question of law* on behalf of the United States. But what happens when the *amicus* ceases abruptly to argue, and simply transmits the direction of the "executive"? In this context, is not the State Department the authority to announce a position of the "executive" with regard to questions concerning "recognition"? Yet, on this brief, the State Department is represented only by "advisers" who are only "of counsel" on the brief. The line of authority is unclear. Perhaps it could be clarified, if clarity were desired, but for the present this brief stands as an illustration of the elusiveness of the locus of the authority responsible for its conclusion.

A forthright decision on recognition *vel non* would hardly be put forward over the signatures of subordinate Justice Department attorneys, with three State Department adviser-attorneys noted as "of counsel". To break up a great issue into little pieces is *inevitably* to produce the result that the great issue may never be decided at the appropriate level—and most significantly of all, that *lines of political responsibility are lost or obscured.*

All this adds up to an unsatisfactory state for the constitutional law of presidential empowerment. This point has been reached through an overexpansion and overuse of what have become the now trite generalities of *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936), cited whenever any presidential power over foreign relations is asserted. Quite aside from the fact that no official in the United States, high or low, has unlimited and unchecked power over any area as vast as foreign relations, the executive branch's powers therein must, if sufficiently extended, collide with a number of clearly expressed congressional powers—over war, armies, foreign commerce, treaties, and even the appointment of ambassadors.

The concession to the executive branch of power to bestow "standing" *ad hoc*, "standing" *pro hac vice*, on unrecognized foreign governments and their instrumentalities, is a step of great and possibly baneful importance in the history of relations between the judicial and the executive branches; it is a step that should not be taken without the fullest consideration by this Court. That is the least that can be said—and in this petition for the writ of certiorari it is the most that Petitioners now need show, to produce conviction in the mind of the Court that this case should be heard here.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

BRIAN D. STARER
Counsel of Record
HAIGHT, GARDNER, POOR & HAVENS
195 Broadway
New York, New York 10007

CHARLES L. BLACK, JR.
435 W. 116th Street
New York, New York 10027
Counsel for Petitioners

Of Counsel:
CHARLES B. ANDERSON
RICHARD A. MENCHINI
DON P. MURNANE, JR.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1005—August Term 1987

(Argued April 26, 1988 Decided October 31, 1988)

Docket No. 87-9022

NATIONAL PETROCHEMICAL COMPANY OF IRAN,

Plaintiff-Appellant,

—v.—

THE M/T STOLT SHEAF, her engines, boilers, etc., POSIDEN NAVIGATION, INC., PARCEL TANKERS, INC., STOLT NIELSEN, INC., and STOLT NIELSEN A/S,

Defendants-Appellees.

Before:

CARDAMONE, PRATT and MAHONEY

Circuit Judges

The National Petrochemical Company of Iran appeals from the October 27, 1987 order of the United States District Court for the Southern District of New York (Owen,

J.), reported at 671 F. Supp. 1009 (S.D.N.Y. 1987), dismissing its complaint on the ground that plaintiff lacks standing to sue because it is an instrumentality of the Iranian government.

Reversed and remanded.

RICHARD D. GAINES, New York, New York, *for Plaintiff-Appellant.*

BRIAN D. STARER, New York, New York (Charles B. Anderson, Richard A. Menchini, Don P. Murnane, Jr., Haight, Gardner, Poor & Havens, New York, New York, Charles L. Black, Jr., New York, New York, of counsel), *for Defendants-Appellees.*

Joan E. Hartman, U.S. Department of Justice, Civil Division, Washington, D.C. (Michael F. Hertz, U.S. Department of Justice, Civil Division, Michael G. Kozak, Acting Legal Adviser, Ronald J. Bettauer, Assistant Legal Adviser, Sean D. Murphy, Attorney-Adviser, U.S. Department of State, James M. Spears, Acting Assistant Attorney General, Rudolph W. Giuliani, United States Attorney, Washington, D.C., of counsel), *filed a brief on behalf of the United States of America as Amicus Curiae.*

CARDAMONE, *Circuit Judge*:

The sole question presented on this appeal is whether National Petrochemical Company of Iran (NPC), a foreign corporation wholly owned by the government of Iran, is entitled to bring suit as a plaintiff in a diversity action in federal court. To answer such a question in this shoal-strewn area of the law, it is wise for courts to have in mind, like doctors taking the Hippocratic oath, that they must "first, do no harm." For the reasons that follow, we hold that NPC may maintain its action in the courts of the United States.

I

A brief background is necessary. In November of 1979 militants loyal to the Ayatollah Khomeini seized the United States Embassy in Tehran and took 52 American diplomatic personnel hostage. With the embassy and its personnel still in the militants' hands, on April 7, 1980 President Carter severed diplomatic relations with Iran and issued Executive Order No. 12,205, 45 Fed. Reg. 24,099 (1980), barring the sale to it of American products. As a result, NPC—which is a subsidiary of the National Iranian Oil Company that in turn is wholly owned by the government of Iran—found itself unable to procure essential chemicals such as ethylhexanol, orthoxylene, and ethylene dichloride from its usual sources in the United States. NPC's attempts to circumvent President Carter's trade embargo resulted in the transactions that brought about the instant litigation.

In the spring of 1980, NPC agreed to buy the needed chemicals from Monnris Enterprises (Monnris) of Dubai,

United Arab Emirates. Monnris arranged to purchase them from Rotexchemie Brunst & Co. of Hamburg (Rotex), which contracted with United States sellers through its Geneva affiliate, Formula, S.A. (Formula). Rotex and Formula apparently fabricated shipping documents that concealed both the origin of the chemical cargo and its destination, and by such illegal methods were able to draw on the letters of credit issued by NPC before the cargoes were even shipped.

In August, 1980 Rotex chartered the defendant M/T Stolt Sheaf from the Liberian defendant Parcel Tankers, Inc. to carry the chemicals from Houston, Texas to Iran, via Barcelona, Spain. The remaining defendants are United States and Norwegian companies affiliated with Parcel Tankers and the M/T Stolt Sheaf. Rotex planned to deliver the embargoed goods to NPC in Iran, but when war broke out between Iran and Iraq in September, 1980 the chemicals were diverted to Taiwan, where Rotex resold them.

NPC thereupon instituted civil and criminal suits against the middlemen in Hamburg and Rotterdam to recover the losses it incurred in its scheme to skirt the American trade embargo. Because these suits were unsuccessful, plaintiff filed a complaint on September 30, 1986 in the United States District Court for the Southern District of New York (Owen, J.) alleging that the above named defendants had participated with the middlemen in fraud, conversion, falsifying bills of lading, all in breach of their duties and obligations under the bills of lading and the law. In a published decision, 671 F. Supp. 1009 (S.D.N.Y. 1987), Judge Owen concluded—based upon a United States State Department letter written in connection with an unrelated case, *Iran Handicraft & Carpet*

Export Center v. Marjan Int'l Corp., 655 F. Supp. 1275 (S.D.N.Y. 1987)—that the United States has not recognized the Khomeini government of Iran. The district court therefore held that because NPC is a wholly-owned entity of an unrecognized foreign government, it is not entitled to bring suit in the courts of the United States. It dismissed NPC's complaint with prejudice. 671 F. Supp. at 1010.

On NPC's appeal from dismissal of its complaint, the United States has, for the first time, entered the litigation, submitting a brief as Amicus Curiae signed by attorneys from the Justice and State Departments, urging that NPC be granted access to the courts of the United States in this case.

II

We turn to an analysis of the law. Article III of the United States Constitution extends the federal judicial power to "all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const., art. III, § 2, cl. 1. To effectuate this power, the United States Judicial Code provides diversity jurisdiction over any civil action arising between "a foreign state . . . as plaintiff and citizens of a State or of different States." 28 U.S.C. § 1332(a)(4) (1982).

To determine whether NPC as a wholly-owned entity of the Khomeini government of Iran should be granted access to federal court under § 1332(a)(4), it is helpful to review several well-established rules in this area of the law. In order to take advantage of diversity jurisdiction, a foreign state and the government representing it must be "recognized" by the United States. *See Pfizer Inc. v. India*, 434 U.S. 308, 319-20 (1978); *Calderone v. Naviera Vacuba*

S/A, 325 F.2d 76, 77 (2d Cir. 1963); *Land Oberoesterreich v. Gude*, 109 F.2d 635, 637 (2d Cir.), *cert. denied*, 311 U.S. 670 (1940). As an incident to the President's express constitutional powers to appoint, U.S. Const., art. II, § 2, and to receive ambassadors, *id.* § 3, and to his implied power to maintain international relations, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-20 (1936), the Supreme Court has acknowledged the President's exclusive authority to recognize or refuse to recognize a foreign state or government and to establish or refuse to establish diplomatic relations with it. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938); *see also Restatement (Third) of the Foreign Relations Law of the United States* § 204 (1987) (*Restatement 3d*).

For our purposes in this case, we also note that, under international law, a "state" is generally defined as "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." *Restatement 3d* § 201; *see Texas v. White*, 74 U.S. (7 Wall.) 700, 720 (1868). Although international law purports to require recognition of "states" that satisfy the elements of this definition, recognition of the particular government in control of another state is not mandatory. Further, a state *derecognizes* a governmental regime when it recognizes another regime as the legitimate government of that state. For example, when the United States recognized the People's Republic of China it derecognized the regime of the Taiwanese "Republic of China" which the United States had previously treated as the Chinese government. *See Restatement 3d* § 203, Comment f.

A break in diplomatic relations with another government does not automatically signify denial of access to federal courts. *See Sabbatino*, 376 U.S. 408-412. As the Supreme Court has observed, courts are hardly competent to assess how friendly or unfriendly our relationship with a foreign government is at any given moment, and absent some "definite touchstone for determination, we are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts." *Id.* at 410; *see Pfizer Inc.*, 434 U.S. at 319-20. With these general rules in mind, we consider the circumstance of the instant case.

III

A. *Recognition For Purposes of Federal Diversity Jurisdiction*

The United States, as noted, severed diplomatic relations with Iran in 1980. In addition, NPC and Amicus concede that the President has never formally recognized the Khomeini government of Iran. The district court relied on a letter from the Assistant Legal Advisor for Management of the Department of State clarifying Iran's diplomatic status in connection with *Iran Handicraft & Carpet Export Center v. Marjan Int'l Corp.*, 655 F. Supp. 1275 (S.D.N.Y. 1987). The letter, dated December 26, 1985, stated in part:

> In response to your letter of December 13, 1985, the questions you posed and the answers of the State Department are as follows:
>
> "1. Has the United States recognized the Khomeini government of the Islamic Republic of Iran?"
>
> Answer: No.

Id. at 1280 n.4. Amicus contends that this response referred merely to the absence of formal recognition and was not intended to foreclose courts from entertaining suits by the Khomeini regime. NPC and Amicus argue that the Executive Branch has not prohibited the Khomeini regime's access to federal courts, and that the Executive Branch may recognize a government for the purposes of bringing suit despite the absence of formal recognition.

Appellees assert, to the contrary, that unlike diplomatic relations, the President's formal statement of recognition of a foreign government is a necessary condition to permitting it to sue in federal court. Certain language in the Supreme Court's decisions arguably supports such a requirement. *See, e.g., Sabbatino*, 376 U.S. at 410 ("[T]he refusal to recognize has a unique legal aspect. It signifies this country's unwillingness to acknowledge that the government in question speaks . . . for the territory it purports to control.") (citations omitted); *Guaranty Trust*, 304 U.S. at 137 ("[I]n conformity to generally accepted principles, the Soviet Government could not maintain a suit in our courts before its recognition by the political department of the Government."). Thus, appellees urge that NPC must be denied access to federal court based on the President's failure to extend formal recognition to the Khomeini government. We disagree and hold that the absence of formal recognition does not necessarily result in a foreign government being barred from access to United States courts.

Two reasons support this holding. First, as this century draws to a close, the practice of extending formal recognition to new governments has altered: The United States Department of State has sometimes refrained from announcing recognition of a new government because

grants of recognition have been misinterpreted as pronouncements of approval. *See* 77 *State Dep't Bull.* 462-63 (Oct. 10, 1977) ("In recent years, U.S. practice has been to deemphasize and avoid the use of recognition in cases of changes of governments . . . ."); *Restatement 3d* § 203, reporter's note 1 (commenting on recent deemphasis of formal recognition). As a result, the absence of formal recognition cannot serve as the touchstone for determining whether the Executive Branch has "recognized" a foreign nation for the purpose of granting that government access to United States courts.

Second, the power to deal with foreign nations outside the bounds of formal recognition is essential to a president's implied power to maintain international relations. *Cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-20 (1936). As part of this power, the Executive Branch must have the latitude to permit a foreign nation access to U.S. courts, even if that nation is not formally recognized by the U.S. government. This is because the president alone—as the constitutional guardian of foreign policy—knows what action is necessary to effectuate American relations with foreign governments. *Cf. Sabbatino*, 376 U.S. at 411 n.12 (citing criticisms of any policy which would mandate formal recognition before a foreign nation could sue in U.S. courts).

This case serves as an excellent example. Relations between the United States and Iran over the past eight years have been less than friendly. Yet, the status of that relationship has not been unchanging. There have been periods of improvement, for example, release of the embassy hostages, and periods of worsening relations, most recently occasioned by the unfortunate downing of an Iranian civilian airliner by the U.S.S. Vincennes. It is

evident that in today's topsy-turvy world governments can topple and relationships can change in a moment. The Executive Branch must therefore have broad, unfettered discretion in matters involving such sensitive, fast-changing, and complex foreign relationships. *See Guaranty Trust*, 304 U.S. at 137 ("What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government."); *Sabbatino*, 376 U.S. at 410 ("This Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence . . . ."); *Curtiss-Wright*, 299 U.S. at 319 ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.").

B. *Deference to the Executive Branch*

Determining that formal recognition is not necessary for Iran to gain access to U.S. courts does not end our inquiry. We must also consider whether the Executive Branch—despite its withholding of formal recognition—has evinced a willingness to permit Iran to litigate its claims in the U.S. forum. Several facts persuasively indicate such a willingness. For example, Iran and the United States entered into the Algerian Accords to resolve the embassy personnel hostage crisis; an ongoing Iran-United States Claims Tribunal at the Hague continues to adjudicate disputes between the two countries; and the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran remains in full force and effect. Standing alone, none of these indicia of Executive Branch willingness to allow Iran to proceed as a

plaintiff in the United States courts would necessarily persuade us to reverse the district court and grant access. Considering these factors in the aggregate, and not in isolation, as integral components of the United States overall relationship to Iran, the above recited connections strongly suggest that the Executive Branch has evinced an implicit willingness to permit the government of Iran to avail itself of a federal forum.

It is unnecessary to go further in examining other treaties, documents, or ties in order to ascertain the Executive Branch's intentions regarding Iran's access to the federal courts. The United States has submitted a Statement of Interest pursuant to 28 U.S.C. § 517 (1982) stating that "it is the position of the Executive Branch that the Iranian government and its instrumentality should be afforded access to our courts for purposes of resolution of the instant dispute." Because this Statement was not filed with Judge Owen, he was not apprised of the Executive Branch's position prior to ruling.

Appellees protest that for us to defer to what they term an "*ad hoc, pro hac vice*" directive to allow NPC's suit will encourage arbitrary and unpredictable pronouncements on the status of foreign governments, but we need not reach that question here because there is no indication that this is an arbitrary or *ad hoc* directive. This is not a case where the Executive Branch is attempting to prohibit a formally recognized government from bringing a single suit in the United States courts, nor is it a case where the Executive is arbitrarily allowing some suits by an unrecognized nation while disallowing others. Rather, here the Executive Branch—after entering into treaties with Iran, after establishing a claims tribunal to adjudicate disputes between the two countries, and after complying with U.S.-

Iran agreements—expressly entered this case as Amicus requesting that Iran be given access to our courts. Under such circumstances, and as the sole branch authorized to conduct relations with foreign countries, the Executive clearly did not act arbitrarily. Accordingly, we hold that, for all the reasons stated, NPC must be permitted to proceed with its diversity suit in the Southern District of New York.

IV

The judgment of the district court dismissing NPC's complaint is reversed, the complaint is reinstated and the matter is remanded to the district court for further proceedings.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 87-9022

Filed October 31, 1988

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of October, one thousand nine hundred and eighty-eight.

Present: Hon. Richard J. Cardamone
Hon. George C. Pratt
Hon. J. Daniel Mahoney

Circuit Judges,

NATIONAL PETROCHEMICAL COMPANY OF IRAN,

Plaintiff-Appellant,

—v.—

THE M/T STOLT SHEAF, her engines, boilers, etc., POSIDEN NAVIGATION, INC., PARCEL TANKERS, INC., STOLT NIELSEN, INC., and STOLT NIELSEN A/S,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court.

ELAINE B. GOLDSMITH,
Clerk

BY: /s/ EDWARD J. GUARDARO
Edward J. Guardaro,
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

October 27, 1987

No. 86 Civ. 7505 (RO)

NATIONAL PETROCHEMICAL COMPANY OF IRAN,

Plaintiff,

—v.—

THE M/T STOLT SHEAF, her engines, boilers, etc., POSIDEN NAVIGATION, INC., et al.,

Defendant.

Mendes & Mount, Three Park Avenue, New York City (Louis M. Rohrberg, of counsel), for plaintiff.

Haight, Gardner, Poor & Havens, New York City (Brian D. Starer, Charles B. Anderson, Richard A. Menchini, Don P. Murnane, Jr., of counsel), for defendant.

AMENDED OPINION AND ORDER

OWEN, District Judge.

The National Petrochemical Company of Iran commenced this action to recover losses incurred in a scheme to ship chemicals from the United States to Iran in violation of the trade embargo.[1] This motion presents the critical preliminary issue of whether plaintiff is an entity of the current government of Iran

1 It appears that in order to acquire the chemicals plaintiff was a willing participant in a scheme which required the use of false and forged shipping documents on three separate occasions to conceal that Iran was the final receiver and that Bandar Khomeini was the port of discharge.

and as such is not entitled to sue in the courts of the United States.

Article III, Section 2 of the United States Constitution provides:

> The judicial Power shall extend to all cases . . . between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

That judicial power has long been interpreted to extend access to our courts only to "governments recognized by the United States and at peace with us." *Pfizer Inc. v. India*, 434 U.S. 308, 319-20, 98 S.Ct. 584, 591-92, 54 L.Ed.2d 563 (1978); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). Courts properly defer to the executive branch in determining which nations are entitled to sue. *Pfizer*, 434 U.S. at 320, 98 S.Ct. at 591; *Iran Handicraft & Carpet v. Marjan Intern. Corp.*, 655 F.Supp. 1275, 1277 (S.D.N.Y. 1987). As the Supreme Court said in *Sabbitino*

> . . . the refusal to recognize [a government] has a unique legal aspect. It signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control . . . Political recognition is exclusively a function of the Executive.

376 U.S. at 410, 84 S.Ct. at 931

It is undisputed that the current government, established by the Ayatollah Khomeini following the governmental breakdown in Iran, has not been recognized by the United States. *See Iran Handicraft*, 655 F.Supp. at 1280, n. 4.[2] Such nonrecog-

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2 The text of a letter from the Assistant Legal Advisor for Management at the State Department written in response to a query from the litigants in that action, dated December 26, 1985, reads as follows:

> "In response to your letter of December 13, 1985, the questions you posed and the answers of the State Department are as follows:
>
> 1. Has the United States recognized the Khomeini government of the Islamic Republic of Iran?
>
> Answer: No.

nition mandates that an action by that government be dismissed with prejudice. *See Republic of Vietnam v. Pfizer*, 556 F.2d 892, 894 (8th Cir. 1977) (upholding dismissal with prejudice of action filed by Republic of Vietnam on ground that it had ceased to exist and U.S. had not recognized new government), *noted without comment*, 434 U.S. 308, 309 n. 1, 98 S.Ct. 584, 586 n. 1, 54 L.Ed.2d 563 (1978).

The remaining question is whether the National Petrochemical Company is an Iranian government entity. *See Federal Republic of Germany v. Elicofon*, 358 F.Supp. 747, 756-57 (E.D.N.Y. 1972), *aff'd*, 478 F.2d 231 (2d Cir. 1973) *cert. denied*, 415 U.S. 931, 94 S.Ct. 1443, 39 L.Ed.2d 489 (1974). Plaintiff performs a governmental function and operates as an agency of the Iranian government in the manufacture, distribution, transportation and marketing of petrochemicals in the nationalized oil industry.[3] It is wholly owed by the Iranian government, and is under the direct control and supervision of the Ministry of Petroleum. It is therefore a government entity.

The action is dismissed with prejudice.

So ordered.

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2. Did the United States sever diplomatic relations with Iran? If so, on what date were they served [sic], and have they been re-established since that date?

Answer: Diplomatic relations with Iran were severed by the United States on April 7, 1980, and have not been reestablished."

3 The Iranian legislature has specifically named and treated the National Petrochemical Company as a government entity in various enactments.

CONSTITUTIONAL PROVISIONS INVOLVED

Article II, §§ 2 and 3 of the Constitution provide in pertinent part as follows:

> Section 2. [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
>
> * * *
>
> Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Article III, § 1 of the Constitution provides as follows:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

RULE 28.1 LISTING OF PARENTS, SUBSIDIARIES AND AFFILIATES OF POSIDEN NAVIGATION INC., PARCEL TANKERS, INC., STOLT-NIELSEN, INC., AND STOLT-NIELSEN A/S

Agencia Maritima Basal S.A.
Anthony Radcliffe Steamship Company Limited
Carmel Transport Corporation
Deltank Limited
Freeport Development Corp.
H & P Freightways Limited
Hedon Tank Transport Limited
Llangollen Finance Corp.
Monterey Shipping Corp.
N-C Stolt Transportation Services Co. Ltd.
Norland Shipping Company, Inc.
NYK Stolt Tankers, S.A.
Parcel Tankers Malaysia Sdn. Berhad
Seabulk America Partnership, Ltd.
Shore Tank Terminals, Inc.
Stolt Aquamarine Inc.
Stolt Arrendamento de Equipamento e Servicos Ltda.
Stolt Boel Inc.
Stolt Castle Inc.
Stolt Condor Inc.
Stolt Cormorant Inc.
Stolt Eagle Inc.
Stolt Emerald Inc.
Stolt Excellence Inc.
Stolt Exporter Inc.
Stolt Falcon Inc.
Stolt Finance Corporation
Stolt Finance II, Inc.
Stolt Finance III, Inc.
Stolt Finance IV, Inc.
Stolt Finance V, Inc.
Stolt Gusar Inc.
Stolt Hawk Inc.
Stolt Heron Inc.

Stolt Integrity Inc.
Stolt Jade Inc.
Stolt Llandaff S.A.
Stolt Loyalty Inc.
Stolt Norness Inc.
Stolt Pride Inc.
Stolt Sapphire Inc.
Stolt Sincerity Inc.
Stolt Span Inc.
Stolt Spirit Inc.
Stolt Tankers and Terminals (Holdings) S.A.
Stolt Tank Containers Inc.
Stolt Tankers (U.S.A.) Inc.
Stolt Tankers Inc.
Stolt Tenacity Inc.
Stolt Terminais (Santos) Ltda.
Stolt Terminals (Chicago) Inc.
Stolt Terminals (Houston) Inc.
Stolt Terminals (Perth Amboy) Inc.
Stolt Terminals Holdings B.V.
Stolt Terminals Investments N.V.
Stolt Terminals Inc.
Stolt Topaz Inc.
Stolt Transportation Services Inc.
Stolt Transportation Services Pte. Ltd.
Stolt Trusty Inc.
Stolt Uskok Inc.
Stolt Victor Inc.
Stolt-Nielsen Argentina S.A.
Stolt-Nielsen Australia Pty. Ltd.
Stolt-Nielsen do Brasil Ltda.
Stolt-Nielsen Japan
Stolt-Nielsen Marine Services Philippines, Inc.
Stolt-Nielsen Nederland B.V.
Stolt-Nielsen Philippines, Inc.
Stolt-Nielsen Shipping A/S
Stolt-Nielsen Singapore Pte. Ltd.
Stolt-Nielsen U.K. Limited
Stolthaven B.V.

Uyeno Stolt Tankers (Australia) Pty. Limited
Uyeno Stolt Tankers, Inc.
Venezolana Transporte DeQuimicos S.A.
Ventura Navigation, Inc.